

Why were SB 1130 & HB 5647 introduced?

Michigan Association of Realtors
Michigan Association of Home Builders

1. Under the current critical dunes statute, the DEQ cannot allow building on certain lots, and in *Heaphy v Department of Environmental Quality*, the Court of Appeals upheld a \$1.8 million judgment against the DEQ for denying a permit or variance to build on one of those parcels. The DEQ knew that the Heaphys' property is not unique, and without a change, the State could be forced to pay compensation again and again, requiring the payment of large awards and threatening to wipe out the program. SB 1130 and HB 5647 allow a use of those properties, with specific standards to protect the dunes but allow a home or other use of the property instead of forcing a taking.
2. The basic framework of the law as enacted in 1989 followed a zoning model, with the expectation that local governments would be the primary enforcement agency and that this model would fit well with the zoning ordinances and administration that local governments knew. The downside is that zoning employs very broad, often subjective standards. For a number of reasons – chief among them the threat of liability for takings and the lack of local expertise in the science involved – only a very few local governments have opted to enact ordinances and take over enforcement. Instead, the DEQ is the primary enforcement agency and those subjective standards make the process for trying to get a permit long, expensive, and uncertain. The zoning terms used do not mesh well with environmental protection statutes.
3. The DEQ faced difficult issues in applying those broad, subjective standards at the local level and was subject to lobbying (as happens with most zoning) to interpret those standards a particular way or to adopt regular practices that the statute did not clearly prescribe. Because the law assumes that local zoning ordinances would apply, the DEQ has no authority to promulgate regulations and tried to use "Guidance Documents" to create them.
4. The use of more objective standards, clearly tied to the specific goals of the statute to both protect and promote the use of the critical dune areas, with certain uses by right (for example, driveways to the houses that are already allowed), using plans drawn by architects and engineers to prevent erosion and to stabilize the dune, can provide greater certainty to an applicant and apply the DEQ's limited resources in a more efficient way.
5. The amendments incorporate the terms of court rules and court decisions applying the statute, which should also promote more consistent and more efficient decision-making.
6. The existing structure of the statute is, frankly, very hard to follow. Many of the amendments are directed to making the entire part clear – for example, putting all the permit standards in one section, all of the variance requirements in another.

WHAT CHANGES DO SB 1130 & HB 5647 MAKE TO CURRENT LAW?
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This document does not include the LSB stylistic changes which are too numerous to list.

Sec. 324.35301 Definitions

Adds a definition of “permit”

Sec. 324.35302 Legislative findings

Keeps subsection (a) describing critical dunes as a unique, irreplaceable and fragile resource.

Strikes the remaining subsections and replaces them with new subsections that recognize private property rights and recognize the benefits of economic development and multiple human uses while ensuring and enhancing the diversity, quality, functions and values of the critical dunes and their sound management.

Sec. 324.35303 Notice to local units of government and property owners...

No changes

Sec. 324.35304 Permits for uses in critical dune areas...

More clearly states the requirement for a permit before a person can initiate a use in a critical dune area and combines all the basic permit standards that were previously in several sections.

Simplifies notice requirements for the department and local government.

Increases the number of persons needed to trigger a public hearing from 2 to 5.
Current law allows any couple who own property to trigger the expenditure of public and private resources on a hearing. This provision would require more.

Restricts who can request a public hearing to anyone owning property or residing on property within one mile of the project, instead of anyone within the local unity of government.

Limits local ordinances to providing a level of protection “substantially equivalent” to the state.

Changes permit approval process to require a permit be approved unless the department can demonstrate the actual harm to the environment resulting from the use will significantly damage the public interest on the privately-owned land by unreasonably depleting or degrading the quality, diversity, or functions of the critical dune areas within the boundaries of a local unit of government. *This standard is taken from the court's opinion in Jemal v Department of Environmental Quality. The department denied a special exception based on a "potential for erosion" and the applicant's failure to "assure protection" of the appearance of the dune and its environment, without stating the criteria that would allow an applicant to show "the requisite 'environmental assurance,'" as the court described it.* These additional provisions ensure that if the department, using the expertise of its staff, determines that the use proposed will cause the kind of damage that the statute is intended to prevent, the permit should be denied. The damage must be "more likely than not," the standard definition of "preponderance of the evidence." The impact is not measured by its effect on the entire critical dunes area statewide, but within the local unit for government. *The Jemal court read the law to require a statewide impact before a permit or special exception could be denied. This provision does not set the bar that high but also makes clear that the effect must be measured against an area larger than simply the lot itself.*

The decision may not rest on speculation, as the denial in Jemal appeared to do: Expert opinion and judgments may be used if they meet the minimum standards for admissibility for expert opinions taken from Michigan Rule of Evidence 702, that is, the decision on the permit must be based on sufficient facts or data; the product of reliable principles and methods; and these principles and methods have been reliably applied to the facts of the case. The facts or data on which the decision is based must be in the record, and the evidence used must at least be "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs," a standard taken from the evidence standard for administrative proceedings, as described in MCL 24.275. The local government or the department must meet the stated burden of proof, and any review or appeal of the decision must find that these same standards have been met.

Solves the statutory forced-taking issue by allowing construction on a lot recorded before July 5, 1989 that does not have sufficient buildable area landward of the crest to construct a dwelling or other permanent use. This issue has threatened to bankrupt the program altogether. Under existing law, permits and variances cannot be built on certain lots, and in *Heaphy v Department of Environmental Quality*, the Court of Appeals upheld a \$1.8 million judgment against the DEQ for denying a permit or variance on one of those parcels. Without a change, the State will be forced to compensate other land owners for taking away all use of their property.

Allows construction of a dwelling or other permanent use on a lot recorded before July 5, 1989, if it does not have sufficient buildable area landward of the crest, but construction must be placed landward of the crest to the greatest extent possible.

Requires the portion of construction built lakeward of the crest to be placed in the location that has the least impact on the critical dune area.

Clarifies permit requirement for construction occurring within 100 feet landward of the crest of the first landward ridge of a critical dune (not a foredune) to have a site plan prepared by an engineer or architect that provides for the disposal of storm waters without serious soil erosion and without sedimentation of any stream or other body of water and removes subjective standards for construction.

Clarifies permit requirement for construction occurring within 100 feet landward of the crest of the first landward ridge of a critical dune (not a foredune) to have access to the structure from the landward side of the dune.

Clarifies permit requirement for restabilization of the dune with indigenous vegetation when the construction occurs within 100 feet landward of the crest of the first landward ridge of a critical dune (not a foredune).

Clarifies permit requirement that the crest of the dune not be reduced in elevation when construction occurs within 100 feet landward of the crest of the first landward ridge of a critical dune (not a foredune).

Sec. 324.35305 Hearing; judicial review

Provides that an applicant for a permit or a special exception or the owner of the property immediately adjacent to the proposed use aggrieved by a decision by the department has standing to request a formal hearing on the matter. *With the dramatic shifts in standing in the Michigan courts in the last five years, this provision ties standing to a simple, objective standard before the time and expense of the formal hearing process is invoked.*

Sec. 324.35306 Lawful use of land or structure

Provides for exemptions from permitting for maintenance, repair or replacement of existing utility lines if:

The work is completed by vehicles not driven on slopes greater than 1 in 3.

Disturbed areas are immediately stabilized and revegetated with native vegetation; removal of woody vegetation is done in a manner that assures the minimization of any adverse effects and will not significantly alter the physical characteristics of stability of the dune.

When utility poles are replaced the new pole is set adjacent to the existing pole and the existing pole is removed by cutting at ground level, not excavation.

Repair of underground utility wires shall be limited to the minimal excavation necessary to replace the wires.

Replacement of wires on slopes steeper than 1 to 4 may be done only by plowing or directional boring.

Sec. 324.35307 Maps

No changes

Sec. 342.35308 Prohibited uses; exception

No changes

Sec. 324.35309 Use permit and inspection fee.....

No changes

Sec. 324.35310 Suspension or revocation of permit; restraining order, injunction...

Provides that only the department may request the attorney general to institute an action for a restraining order, injunction or other appropriate relief. *Although anyone may request the attorney general to review legal obligations under this or other laws, this formal, statutory authorization to request the attorney general to institute action is properly a function of the department as the decision-making and enforcing agency under this part.*

Provides that only the governing body of a local unit of government may request the county prosecutor to institute an action for a restraining order, injunction or other appropriate relief to the governing board of a local unit of government. *As with action by the attorney general, although anyone may request the prosecutor to review legal obligations under this or other laws, this formal, statutory authorization to request the county prosecutor to institute action is properly a function of the local governing body as the decision-making and enforcing agency under this part.*

Sec. 324.35311 Review of atlas

Allows the department to review and, with the acquiescence of the Legislature, change the critical dunes atlas every 10 years. *Current law only authorized the initial creation of the atlas of critical dunes; this provision would give the department the ability to study and make recommendations to the Legislature based upon more current or better information.*

Sec. 324.35311A. Driveways

Allows a single driveway by right and sets up the standards for construction and permitting of the driveway including:

Consideration of the use of measures to minimize the impact of the driveway.

Consideration of alternative locations on the same lot of record.

For driveways on slopes steeper than 1 to 4 but not steeper than 1 to 3, plans for site including disposal of storm water without serious erosion, methods of controlling

erosion from wind and water and restabilization must be submitted along with the permit applications. These plans must be prepared by a registered engineer or a licensed architect.

For driveways on slopes steeper than 1 to 3, plans for site including disposal of storm water without serious erosion, methods of controlling erosion from wind and water and restabilization must be submitted along with the permit applications. These plans may only be prepared by a registered engineer. The engineer shall certify under seal the driveway is not likely to increase erosion or decrease stability.

Allows temporary construction access when there is no driveway and sets standards for construction and permitting of that access including:

A requirement the temporary access shall not involve a contour change or vegetation removal that increases erosion or decreases stability except as can be restabilized after construction. The temporary access must be maintained in stable condition and restabilization must begin upon completion of the construction.

Adds a definition of “driveway,” allowing width and shared driveway options, as the owner chooses.

Sec. 324.35311B Accessibility measures

Allows accessibility measures in accordance with the American National Standards Institute (ANSI) Chapter 4 standards for accessible routes for any dwelling or other permanent structure.

Sets standards for construction and permitting of these measures including:

On slopes steeper than 1 to 4 but not steeper than 1 to 3 plans for the site including disposal of storm water without serious erosion, methods of controlling erosion from wind and water and restabilization must be submitted along with the permit applications. These plans must be prepared by a registered engineer or a licensed architect.

On slopes steeper than 1 to 3 plans for the site including disposal of storm water without serious erosion, methods of controlling erosion from wind and water and restabilization must be submitted along with the permit applications. These plans may only be prepared by a registered engineer. The engineer shall certify under seal the driveway is not likely to increase erosion or decrease stability.

Defines “accessibility measures” as a circulation path and at least one entrance on a circulation path complying with the ANSI Chapter 4 standards for accessible routes.

Clarifies for purposes of this section that driveways are not an accessibility measure.

The choice of components for an accessible route shall be at the option of the applicant.

Sec. 324.35312 Zoning ordinance

Prevents local ordinances and local standards of review of permits and variances from being more restrictive than the state.

Allows a local unit to add land to a critical dune area only by an affirmative vote of the governing body and only after a public hearing. *This provision conforms the law to the required public and formal practice for zoning – only after a public hearing and vote of the elected governing body can additional land be subject to regulation.*

Allows the department to add land to a critical dune area only by an affirmative vote of the governing body and only after a public hearing but maintains the department's ability to add land not more than 250 feet from the landward boundary of a critical dune area. *This just adds a public hearing requirement to existing law, for the same reasons as the preceding subsection.*

Sec. 324.35313 Zoning ordinance; requirements for applications

Updates the reference to forestry management guidelines for Michigan to the latest edition.

Eliminates the requirement for local soil conservation districts to approve tree and vegetation removal before a permit may be issued. *A project must meet soil erosion and sedimentation control regulation, and must comply with forestry management guidelines for any cutting or removal of trees; the additional review is another layer of review.*

Clarifies the existing rule that environmental site assessments or environmental impact statements can only required for special use projects. *This provision restates existing law. Because of their expense and complexity, these reports are reserved for those uses, and not required for ordinary residential construction.*

Sec. 324.35314 Zoning ordinance; review of subdivision development

No changes

Sec. 324.35315 Zoning ordinance; prohibited uses

No changes

Sec. 324.35316 Zoning ordinances; additional prohibited uses in critical dune area; variance; structures; contour maps; guidelines; restoration.

Revises entire section to move permit requirements to 35304, limits this section to variances and special exceptions, removes subjective standards, and creates objective standards tied to the specific goals of the regulation.

Again solves the statutory forced-takings problem for lots of record recorded before July 5, 1989.

Eliminates the requirement the planning commission consult with local soil conservation district before approving construction plans.

Eliminates the language limiting projects deemed “more extensive than required to implement a use for which a permit is required” and replaces it with an objective standard of whether a use is more likely than not to increase erosion or decrease stability.

Updates the reference to forestry management guidelines for Michigan to the latest edition.

Eliminates the open-ended prohibition on uses that are “not in the public interest,” a subjective phrase without a definition in the law, and establishes, in section 35304, objective defined standards in the permit decision to prevent uses that significantly damage the public interest by depleting or degrading the quality, diversity, or functions of the critical dune areas in a local unit of government.

Eliminates the subjective “feasible and prudent alternative location or methods” requirement.

Requires, to the greatest extent possible, proposed construction be placed landward of the crest in the location that has the least impact on the critical dune area.

Eliminates the limitation on contour changes and vegetative removal to those essential to the siting of the project.

Moves the requirement to restabilize the dune with indigenous vegetation to section 35304.

Eliminates the ability of the department to forbid any construction techniques or methods. *Construction techniques or methods are covered by building codes which provide a comprehensive and expert review, as well as standards for consideration of different methods to ensure preservation of life and property. Under this part, the question is whether the use – not the building method to achieve it – meets the standards of the critical dune regulation.*

Section 324.35317 Variances, special exceptions

Changes variance/special exception approval process to require a permit be approved unless the department can demonstrate the actual harm to the environment resulting from the use will significantly damage the public interest on the privately-owned land by unreasonably depleting or degrading the quality, diversity, or functions of the state's critical dune areas. *These provisions match the revised permit provisions in setting objective standards for review, evidence, decisions, and appeals.*

Establishes enforceable standards that shall be based on sufficient facts or data, the product of reliable principles and methods, and principles and methods reliably applied to the facts of the case; the facts or data the decision is based on shall be in the record.

Clarifies the existing rule that environmental site assessments or environmental impact statements can only be required for special use projects.

Reduces the number of days a local unit of government has to review and comment on proposed special exception for 60 to 30 days.

324.35318 Request for revaluation to determine fair market value

No changes

324.35319 Environmental assessment; contents

No changes

324.35320 Environmental impact statement; contents

No changes

324.35321 Review of site plan; duties of planning commission

Removes the local soil conservation district from the plan review process

324.35323 Special use project application, plan and proposed decision; review; action

Changes the time for department to review, affirm, modify or reverse local decision from 60 to 30 days.

324.35323 Destruction of structure or use; exemption

Allows a replacement structure and its use to differ from that which was destroyed providing it does not exceed in size or scope the structure which was destroyed.

Where there will be no greater disturbance to the critical dunes area, there is no justification for prohibiting a structure of the same size. The goal of current law is not to eliminate all existing uses, and this provision is consistent with the protection of the critical dune areas under current law.

324.35324 Management of federally owned and state owned land.

No changes

324.35325 Purchase of lands or interest in lands; purpose

No changes

324.35326 Appropriation; purpose; sufficiency

Entire section struck